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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1585

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD RUSSELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

INTRODUCTION

Respondent concedes that his primary position is that the conduct of the undercover agent in this case "does not involve entrapment at all [under] the classic definition" (Br. 10).[1] The "position of respondent"

[1] Despite this concession respondent nevertheless attempts to show that under the traditional test adopted in *Sorrells* v. *United States*, 287 U.S. 435, and *Sherman* v. *United States*, 356 U.S. 369, the undercover agent's activities constituted entrapment as a matter of law (See Resp. Br. 21-25). This argument, which flatly contradicts respondent's concession in the court of appeals that "[t]he jury could find from the testimony that the government had not unlawfully entrapped Russell * * *" (Court of Appeals Br. 7; Pet. App. 18), is answered in our main brief (pp. 10-25).

is that a new defense to a charge of activity made criminal by an act of Congress (or a state legislature) should be created by this Court, under the Due Process Clause, where it is shown that the conduct would not have been possible had not an undercover agent "'supplied an indispensable means to the commission of the crime that could not have been obtained otherwise, through legal or illegal channels'" (Br. 20-21). The Amici Curiae, on the other hand, urge the Court to exercise its "inherent supervisory power" (ACLU Br. 7), to create a similar defense where an undercover agent "suppl[ies] the contraband upon which a prosecution is based" (ACLU Br. 21).

We note at the outset that, even if the Court were to accept either of these arguments, and took the unprecedented step of creating a defense to illegal activity undertaken in violation of a valid act of Congress, the judgment of conviction in this case would have to be sustained. The record demonstrates that the phenyl-2-propanone ("P-2-P") was obtainable through non-government sources, although it may have been "hard to acquire due to the Government's efforts in suppressing the supply" (Resp. Br. 21). The undisputed evidence establishes that, despite this difficulty, respondent and his accomplices were able to obtain the P-2-P independently before and after the undercover agent appeared (Brief for the United States 2-5, 31-32).

Similarly, the record does not support the defense urged by the amici, since no contraband was supplied to respondent and his accomplices by government

agents. The possession and sale of P-2-P was and remains perfectly legal. P-2-P is not a controlled substance, and only voluntary restraint by manufacturers and suppliers limited its production and availability. Accordingly, the only issue presented by this case is whether the action of the undercover agent in supplying a chemical ingredient, available from other channels, constitutes a defense to a charge of manufacturing, processing, possessing and selling methamphetamines, where respondent and his accomplices proceeded knowingly and voluntarily, without any overbearing or duress, to manufacture the illicit drug that they were predisposed to produce.

I. THERE ARE NO COMPELLING REASONS FOR JUDICIAL CREATION OF A NEW SUBSTANTIVE DEFENSE TO CRIMINAL LIABILITY BROADER THAN THE TRADITIONAL ENTRAPMENT DEFENSE

We have shown in our main brief that, under well accepted standards, the conduct of the undercover agent here was proper, and that it does not differ in any material way from similar activity which has been repeatedly sanctioned by this Court (Br. 27–33). As we believe respondent has conceded, the investigative conduct in this case respected the boundaries established by the entrapment defense as formulated in *Sherman* and *Sorrells*. The policy arguments advanced by the respondent and the amici do not warrant a departure from these accepted standards.

A. Respondent argues that the "evils that are sanctioned" by permitting undercover agents to undertake

the activity present here include (1) the provocation of "disobedience of the laws in order to punish"; (2) the encouragement of "law enforcement officials to participate in crimes"; and (3) the "unrestricted ability of overzealous law enforcement agents selectively to set up defendants for prosecution" (Br. 19). Respondent also claims that this conduct constitutes an "effective violation of the Fifth Amendment right to [sic] self incrimination, as it makes the defendant supply evidence of his own guilt, thus effectively incriminating himself; and is an affront to basic notions of justice" (Br. 19). These claims are without foundation either in general practice or in the record of this case and furnish no basis for the creation of the defense that has been proposed.

The activity of the undercover agent here was not undertaken, as respondent alleges, to "promote disobedience * * * in order to punish," but to apprehend those already engaged in an illicit drug operation. Any doubt that this was the basis for the undercover agent's activities is dispelled by the admission of respondent's accomplice (Tr. 148–149) that, at the first meeting involving himself, respondent, and the undercover agent, on December 7, 1969, he told the undercover agent that he had been manufacturing the illicit drug since May 1969, and had produced about three pounds of it. The care taken here by the undercover agent to insure that respondent and his accomplice were actually engaged in the illicit manufacture of drugs—he did not supply the P-2-P until he had seen the laboratory and had been given a sample of meth-

amphetamines that had been previously produced there—clearly renders hollow any claim here that an "overzealous" law enforcement official "selectively * * * set up defendants for prosecution."

Respondent's claim that his privilege against self-incrimination was violated, because he was made to "supply evidence of his own guilt," is frivolous. He was not "compelled" to supply evidence of his guilt. The very basis of his conviction is that he knowingly and willingly manufactured the illicit drug. Moreover, the privilege against self-incrimination is applicable only to "testimonial compulsion," *Schmerber* v. *California*, 384 U.S. 757, so it cannot cover the drugs he manufactured and sold to the undercover agent. And respondent's incriminating statements to the undercover agent during the course of his criminal enterprise were "wholly voluntary," and no right protected by the privilege was violated by the agent's conduct. See *Hoffa* v. *United States*, 385 U.S. 293, 303. See also *Lewis* v. *United States*, 385 U.S. 206, 209–210, holding that the deception and stratagem employed by undercover agents overstepped no constitutional bounds. Compare *United States* v. *White*, 401 U.S. 745, 749.[2]

[2] Respondent's somewhat contradictary argument, that the trial was rendered "a sham" because "the evidence ha[d] already been provided by the prosecution" (Resp. Br. 19), is equally frivolous. In any event, the evidence here, the methamphetamines which respondent and his accomplices manufactured, was not supplied by the undercover agent; he supplied only a harmless chemical. It was respondent and his accomplices who supplied "the evidence."

Thus the "considerations" which respondent claims led to the adoption of various exclusionary rules (Br. 19) are not present here. Passing by the important distinction between formulation of a rule excluding certain evidence and creation of a new defense to criminal liability, we reiterate that in this case the undercover agent did not violate any express provisions of the Bill of Rights (*Weeks* v. *United States*, 232 U.S. 383), did not violate any federal statute or rule (*Sabbath* v. *United States*, 391 U.S. 585; *McNabb* v. *United States*, 318 U.S. 332, 342), and did not commit any crime (*Nardone* v. *United States*, 308 U.S. 338). As Judge Parker observed in *Sorrells* v. *United States*, 57 F. 2d 973, 978 (C.A. 4), reversed on other grounds, 287 U.S. 435:

> There is no analogy between the rule here under consideration [entrapment] and that which forbids the use on the trial of evidence obtained by a search in violation of the Fourth and Fifth Amendments to the Constitution. These amendments forbid the use of governmental force to search a man's home, his person, his papers, or his effects * * *; and evidence obtained in violation of the amendments is not admissible for the reason that to admit it would nullify the constitutional rights of the accused. * * * Here there is no contention that any constitutional right of the accused has been violated; and the question is, not as to the admissibility of evidence, but as to the validity of an asserted defense to crime.

Even apart from the facts in this case, there is little basis for adopting a rule that allows those who

predisposed to commit a crime to avoid responsibility for it by arguing that the agents engaged in conduct that might have tempted even an innocent man. The apparent objective of such a rule—deterrence against overreaching—is hardly demonstrable or compelling. As the relative infrequency of successful entrapment claims suggests, overworked federal agents and local police do not wander around mindlessly trying to seduce random innocent citizens. An undercover operation typically involves pursuit of a particular lead.[*] Often the lead suggests specific ongoing criminal activity that can only be verified and proved from within. As is so often the case with drug rings, it may be impossible to gather concrete evidence of past violations; thus, it has been considered not only appropriate but also a matter of public responsibility to take a "test boring," as it were, of the suspect's current activities.

For this reason, the "participation" of undercover agents in the criminal ventures, for the purpose of detection and prosecution of the participants, has been repeatedly recognized as a legitimate law enforcement technique. Drug offenses, like the present case, are a "prime example" of the kind of crimes suitable for undercover activity, since they are "committed in secret under such circumstances that perpetrators might never be discovered if government representatives were not permitted to participate to some ex-

[*] See Rotenberg, *The Police Detection Practice of Encouragement*, 49 Va. L. Rev. 871, 875 (1963): "The nature of the process demands this, for it is too complex and time-consuming a technique to be used on a hit-or-miss basis."

tent." *Whiting* v. *United States*, 321 F. 2d 72, 76 (C.A. 1), certiorari denied, 375 U.S. 884. See, also, *United States* v. *Milisci*, 465 F. 2d 700 (C.A. 5), petitions for certiorari pending (Nos. 72–5528 and 72–5865); *United States* v. *Ortega* (C.A. 2, Nos. 72–1479, 72–1482, decided December 11, 1972, slip. op. 881–907), petitions for certiorari pending (Nos. 72–1098 and 72–1103).

B. The policy reasons advanced by the amici are equally unpersuasive. The amici concede that it is appropriate for "agents of the government to offer to a suspected person an opportunity to commit a crime, because otherwise many crimes, especially those involving contraband, could not otherwise be detected" (ACLU Br. 21). They argue, however, that the "state has an interest only in apprehending those engaged in criminal activity by the mere offer of a neutral opportunity," and that "[t]here is no state interest in intervening in contraband trade in such a way as to obtain any result other than an arrest based upon an opportunity" (*ibid.*).

But, even assuming *arguendo* that the undercover agent here went beyond providing a "neutral opportunity," the argument of amici is erroneous in contending that the state is "not acting within the bounds of its legitimate interest" when its investigators do more than passively provide such an opportunity. As the traditional entrapment doctrine demonstrates, the state does not have any interest in prosecuting an individual who, but for the activity of its agents, would not have engaged in criminal activity because he was not predisposed to do so. It could also be argued that there is no legitimate interest in prose-

ecting a person who, even though desirous of committing the crime, would have been incapable of committing the offense due to impossibility of obtaining the material necessary for its commission. See Note, *The Serpent Beguiled Me And I Did Eat—The Constitutional Status of the Entrapment Defense*, 74 Yale L. J. 942, 949 (1965). But where, as in this case, the accused had the disposition to commit the offense, had engaged in similar conduct, and was able to do so without the assistance of the undercover agent, the government had a legitimate and indeed compelling interest in his apprehension and prosecution, as long as the means employed were not inconsistent with a specific provision of the Constitution or a statute.

The amici argue, however, that if a defendant is "willing to commit the crime and would have done so if he had been able," then the government should have "wait[ed] until he did commit it *sua sponte*" (ACLU Br. 22). This argument overlooks the difficulty in detecting criminal activity of this kind—a difficulty which the amici concede is present here. It is easy to say that the government should have waited until respondent and his accomplices committed the offense "*sua sponte*," but it is much more difficult to say how law enforcement officials should go about detecting clandestine crime and apprehending the offenders without infiltrating their operation in this manner. The amici suggest that it was perfectly proper to offer to purchase the drug for cash rather than in exchange for one of the ingredients. But whether this was the best means of penetrating the illicit drug operation is essentially a question of practical judgment to be

made on a case by case basis by those having expertise in law enforcement matters. Plainly the decision to employ one technique rather than another, in the absence of a violation of the Constitution or a statute, hardly justifies the adoption of a *per se* rule requiring the acquittal of a defendant.

Any doubt in any individual case whether the defendant would have committed a crime of the kind charged, without government intervention, can be determined by the jury under appropriate instructions. That traditional defense, which results in acquittal if the jury entertains a reasonable doubt about the particular defendant's predisposition toward the crime, sufficiently reconciles the innocent individual's interest in not being seduced into crime with the public's interest in uncovering and prosecuting wrongdoers.

II. CREATION OF THE KIND OF SUBSTANTIVE DEFENSE ASSERTED HERE IS A LEGISLATIVE RATHER THAN A JUDICIAL FUNCTION

The foregoing discussion has assumed for the sake of argument that the courts have the *power* to create a new substantive defense to criminal liability under a valid statute that has concededly been violated. We have endeavored to show why no such defense should be created, conferring immunity on the guilty because government agents became involved in the criminal enterprise to an "intolerable degree." But it is not clear that such a power should properly be allocated to the courts, and, even if the courts have such a power, its exercise to create a new "entrapment" defense would not be appropriate.

This Court has never asserted any inherent "supervisory power" to create defenses to criminal activity. The exclusionary rules adopted by the Court to deter or remedy violations of the Constitution or federal statute have been held to arise from the traditional role of courts in formulating rules of evidence. See *McNabb* v. *United States, supra,* 318 U.S. at 341:

> The function of formulating rules of evidence in areas *not governed by statute* has always been one of the chief concerns of courts * * * [a]nd in formulating such rules of evidence for federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance [emphasis added].

The area here—the definition of crimes and the creation of defenses—is one which is governed by statute, and the adoption of a defense not contemplated by Congress necessarily effects a partial repeal of the statute defining the offense. The power of the Court to accomplish such a result is limited to procedural matters and even then, formal submission of the proposal to Congress for its acquiescence or rejection is required. See 18 U.S.C. 3771, 3772.

The arguments advanced by respondent and the amici are plainly insufficient to overcome the strong constitutional and policy considerations against interfering with the "wide range of power that the legislature possesses to adapt its penal laws to conditions as they may exist * * *." *Weems* v. *United States,* 217 U.S. 349, 379; *Powell* v. *Texas,* 392 U.S. 514, 536. Cf.

Spencer v. *Texas*, 385 U.S. 554. The judicial creation of a defense to proscribed activity, unless fairly found to be within the scope of the legislative intent, necessarily qualifies the legislative determination and intrudes into the legislative sphere. See Ratner, *The Function of the Due Process Clause*, 116 U. Pa. L. Rev. 1048, 1063-1068 (1968). The traditional entrapment doctrine, formulated by the Court in *Sorrells* and adhered to in *Sherman*, *supra*, is faithful to these distinctions. The traditional defense is based on the reasonable gleaning of congressional intent that "otherwise innocent" persons induced or encouraged by government agents into committing the proscribed acts should not be punished. It is appropriate to conclude that Congress did not intend to punish people who are in effect innocent victims of cajolery or coercion.

In contrast, the defense that respondent and the amici urge this Court to adopt cannot be said to reflect what must necessarily be congressional intent. The proposed defense is not a rule of evidence; it proceeds on the premise that the defendant is not an "otherwise innocent" or unpredisposed individual, but it would nevertheless create an immunity to punishment predicated solely upon the nature of the government's investigative and detection methods. Within the limits prescribed by the Bill of Rights, however, the weighing of the moral and policy considerations implicit in regulating police conduct by immunizing criminal activity is the province of the legislative branch of government. As far as can be deduced from

federal criminal statutes, their legislative history, and their traditional mode of enforcement, Congress has not decided that persons who are predisposed to commit crimes should receive immunity based on the extent to which undercover investigators participated in the venture.

Moreover, the adoption of the "due process defense" urged by respondent would not only mark an incursion on the Congressional domain, but would apply generally to all state prosecutions, and open the doors of the federal courts to scores of habeas corpus applications in every case in which the defense of entrapment is involved. The "appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction" (*McNabb* v. *United States*, 318 U.S. 332, 340) compels the rejection of a rigid constitutional rule in an area which calls for policy judgments on law enforcement techniques.*

Finally, we point out that judicial "abstention" from the creation of any new entrapment defense is particularly appropriate at this time in view of the fact that Congress will shortly examine the relevant

*The Court has declined to attach a constitutional mandate even to well established common law defenses, such as "insanity, mistake * * * and duress." *Powell* v. *Texas*, 392 U.S. 514, 536; cf. *Spencer* v. *Texas*, 385 U.S. 554, 563–564. And the courts of appeals and district courts have likewise declined to follow such a path with respect to the entrapment defense; they have consistently refused to entertain collateral attacks on state judgments of conviction where defendants have sought to mitigate entrapment defenses. See *e.g.*, *United States ex rel. Hall* v. *Illinois*, 329 F. 2d 354 (C.A. 7), certiorari denied, 379 U.S. 891, and cases cited in our main brief p. 30, n. 19.

issues as part of its in-depth consideration of several proposals to revise the entire federal criminal code. When it does so, the Congress will have the full range of entrapment proposals before it. As we noted in our main brief, the National Commission on Reform of Federal Criminal Laws in its Final Report has urged adoption of an entrapment test similar to that advanced by the minority in *Sorrells* and *Sherman*.[4] The Department of Justice, on the other hand, for the reasons expressed in our opening brief, will support retention of the traditional entrapment test espoused by the majority of this Court in those two cases.[5] A third proposal is included in the bill (S. 1, 93d Cong.) introduced by Senators McClellan, Ervin, and Hruska on January 4, 1973, which combines features of both the above approaches.[6] In view of the

[4] Section 702 of the National Commission's suggested code defines entrapment as occurring "when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment."

[5] The Department has not yet decided whether to urge codification of most defenses; thus it is not yet certain whether its proposal will be embodied in the bill it plans to submit to Congress, or whether it will merely urge that existing law be left undisturbed.

[6] Section 1-3B2 of S. 1 defines entrapment as occurring "when a law enforcement officer or a person requested by a law enforcement officer to assist him induces or encourages a person to engage in prohibited conduct, using such methods of induce-

plenary consideration which Congress will shortly give to this problem, there is no occasion for the Court to use this case as a vehicle for wholesale reevaluation of the entrapment question. Compare *United States* v. *Kras*, No. 71-749, decided January 10, 1973, slip op. 17-18 (concurring opinion of Chief Justice Burger).

As we have already stated, however, we believe there is no need for the Court to break new ground in this case since, under any of the tests proposed above or any other reasonable test, the conduct of the government undercover agent here, taking into consideration all the circumstances of the case, cannot be deemed to have caused the commission of an offense that otherwise would not have been committed. See *Lopez* v. *United States*, 373 U.S. 427, 434.

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ment or encouragement as create a substantial risk that the conduct would be committed by persons other than those who are ready to commit it. Conduct merely affording a person an opportunity to engage in prohibited conduct does not constitute entrapment. A risk is less substantial where a person has previously engaged in similarly prohibited conduct and such conduct is known to such officer as a person assisting him." This general definition renders a defendant's predisposition relevant, but not determinative, of the existence of an entrapment defense. The Section would also except crimes involving the causing or threatening of bodily injury from its coverage. See Section 1-3B2(c).

CONCLUSION

For the reasons stated in our main brief and this reply brief, it is respectfully submitted that the judgment of the court below should be reversed and the judgment of conviction reinstated.

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